Comet Fast Freight, Inc. *and* Richard Lee Chandler.
Case 9-CA-13993

June 25, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On April 24, 1980, Administrative Law Judge Almira Abbot Stevenson issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The Administrative Law Judge, finding that Respondent violated Section 8(a)(1) of the Act by discharging Richard Lee Chandler because he engaged in protected concerted activity, stated:

> . . . Richard Chandler had a reasonable belief, during the entire time of his employment, that the No. 10 truck was unsafe; that he so advised the manager 2 to 3 weeks after his hire; that he nearly had an accident on May 7 because, in part, the turn signals on the truck were not operative; that he immediately [informed Respondent] . . . that he would not drive the truck anymore because it was unsafe . . . and that [Respondent] then terminated Richard Chandler for his refusal to drive the truck because he reasonably believed it to be unsafe. Inasmuch as this truck to the Respondent's knowledge was driven on occasion by other employees of the Respondent, Chandler's complaint involved a safety problem of concern to all of them, and none of them disavowed Richard Chandler's complaints, I conclude that, even though Richard Chandler was not concerned about the safety of the other drivers,[7] his refusal to drive the truck was, in legal contemplation, concerted activity protected by Section 7 of the Act, and his discharge therefor was a violation of Section 8(a)(1).[8]

Although we adopt the Administrative Law Judge's findings of fact, we disagree with the conclusions drawn therefrom. Thus, as set out above in footnote 7 of the Administrative Law Judge's Decision, Chandler's affidavit included his statement that "I was looking out for myself, not the other drivers. The other drivers didn't mind driving the red truck like I did."[2] Based upon this record evidence, the Administrative Law Judge nonetheless concluded that Chandler's admitted lack of concern for his fellow drivers did not remove his refusal to drive the truck from the protection of the Act. We agree that Chandler's subjective lack of concern for his fellow employees is not controlling herein. What is of import, however, is Chandler's admission that the other drivers did not mind driving the truck in question; and it is this admission which must be construed as evidence that Chandler's fellow employees did not share his concerns, and that the condition of the truck was of moment to him alone.[3] In sum, and unlike the cases cited

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing her findings.

On August 11, 1980, Respondent filed with the Board a motion to reopen the record for the limited purpose of placing into evidence a notarized sworn statement made by Raymond Ralph "Jerry" Snidow, in which he recants portions of his testimony given at the hearing in this matter, as well as portions of his pretrial affidavits. The General Counsel filed a motion in opposition thereto. At the hearing, the General Counsel called Snidow as a witness in support of his case. The Administrative Law Judge, however, did not credit any of Snidow's testimony stating that she could "place no reliance whatsoever on any of the testimony of . . . [this] witness," and that "Snidow was so inconsistent as to be practically incomprehensible and he admittedly made false statements in his logs and in an affidavit given to the National Labor Relations Board." Accordingly, and because Respondent's motion to reopen the record would have the effect, if any, of merely attacking credibility, Respondent's motion is hereby denied. See *Kenai Air Service, Inc. d/b/a Kenai Helicopters*, 235 NLRB 931 (1978), and *Coast Delivery Service, Inc.*, 172 NLRB 2268 (1968).

[7] Richard Chandler stated in his pretrial affidavit that "I was looking out for myself, not the other drivers. The other drivers didn't mind driving the red truck like I did."

[8] *Datapoint Corporation*, 246 NLRB 234 (1979); *Thermofil, Inc.*, 244 NLRB 1056 (1979); *Pink Moody, Inc.*, 237 NLRB 39 (1978); *Air Surrey Corporation*, 229 NLRB 1064 (1977); *Carbet Corporation*, 191 NLRB 892 (1971).

[2] The record reflects that, during the course of cross-examination, Chandler admitted that the above-quoted portion of his affidavit was, in fact, true.

[3] We note that the cases cited by the Administrative Law Judge are, in this regard, factually dissimilar from this case. Thus, *Datapoint Corporation*, 246 NLRB 234 (1979), concerned an employee (Clark) who openly spoke to his fellow employees in opposition to an impending layoff. Concluding that the respondent therein discharged Clark "in an attempt to muzzle him regarding his statements to fellow employees about their working conditions," the Board noted that Clark's actions in speaking to his fellow employees constituted concerted action —"a conversation may constitute concerted activity although it involves only a speaker and a listener"—and reasoned that, since Clark had not been scheduled to be laid off, no finding could be made that he spoke out from purely personal interest. The facts of *Thermofil, Inc.*, 244 NLRB 1056 (1979), clearly indicate that other employees shared that discriminatee's safety concerns. *Pink Moody, Inc.*, 237 NLRB 39 (1978), which also involved an employ-

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by the Administrative Law Judge, the record clearly reflects that Richard Lee Chandler's coworkers had not made common cause with him concerning the No. 10 truck. We therefore conclude that his refusal to drive the truck did not constitute concerted activity within the meaning of the Act.

Our dissenting colleague takes us to task for "revers[ing] many years of Board precedent, protecting the rights of individual employees under the statute we are charged to administer" and that we have "turn[ed] away from the recognition that the individual acting alone in today's industrial society can hardly act effectively . . . ." In support of this general proposition, the dissent relies, *inter alia*, upon *N.L.R.B.* v. *Interboro Contractors, Inc.*, 338 F.2d 495 (2d Cir. 1967), enfg. 157 NLRB 1295 (1966). *Interboro*, however, is factually different from this case, and the language relied on by the dissent[4] must be considered in light of that opinion's subsequent recitation of the record evidence relied on by the court (338 F.2d at 499–500):

> The record provides adequate evidence, aside from the testimony of John himself, to support the Board's conclusion that the complaints were for legitimate concerted purposes. Contrary to the examiner's statements that John was acting alone despite an almost complete lack of interest by his fellow employees, *the testimony* of William Landers, Collins, Soebke, and Kleinhous *shows that on several occasions that John was speaking for William and Collins as well as for himself.* Furthermore, while interest on the part of fellow employees would indicate a concerted purpose, *activities involving attempts to enforce the provisions of a collective bargaining agreement may be deemed to be for concerted purposes* even in the absence of such interest by fellow employees. [Emphasis supplied.]

It is therefore clear that the Board and the court relied on the fact that John Landers acted on behalf of his fellow employees as well as in an attempt to enforce the applicable provisions of the collective-bargaining agreement. The present case can claim neither of these factual attributes.[5]

We are here confronted by direct evidence that Chandler's coworkers did not mind driving the truck; that Chandler stood alone in his belief that the truck was unsafe; and, finally, that Chandler's fellow employees saw no reason to make common cause with him concerning this particular issue. Given such record evidence, we would be hard-pressed to rely upon a supposition of common cause, which, in this particular case, has no basis in fact. Our dissenting colleague's statement that he does "not believe that Chandler's fellow employees did not share his concern" is thus not reflective of the reality of the record before us. Indeed, the Administrative Law Judge specifically found that *none* of the other employees who drove the No. 10 truck complained that it was unsafe,[6] and she specifically *did not* find that the safety problems associated therewith were discussed with Respondent's

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ee's refusal to drive a defective truck, nonetheless presented a factual situation in which other drivers, in addition to the discriminatee, had complained about the truck. *Air Surrey Corporation*, 229 NLRB 1064 (1977), presented a situation in which that employer's payroll checks had been repeatedly dishonored. The discriminatee therein (Patton) thereafter made an inquiry at his employer's bank to determine whether the employer's account contained sufficient funds to meet the upcoming payroll and was discharged therefor. Although the Board noted that it was unnecessary to pass upon the question of whether Patton's visit to the bank was protected because he was, in fact, acting in concert with other employees, in finding Patton's discharge to be a violation of the Act, the Board nonetheless stated:

> Although admittedly not entirely motivated by altruistic considerations, Patton's actions clearly encompassed the well-being of his fellow employees. In support of our finding that by so acting Patton was engaging in protected activity, we rely not only on the record evidence which clearly indicates the deep concern engendered by the Respondent's dishonored paychecks, but also on the likelihood that the other employees, in the absence of evidence to the contrary, shared his interest in receiving a valid paycheck and supported his effort to secure Respondent's compliance with the financial obligation it had incurred toward them. [229 NLRB at 1064.]

Finally, in *Carbet Corporation*, 191 NLRB 892 (1971), the Board specifically noted that the inadequate ventilation system had long been the subject of complaints by Cybul (the discriminatee) and other employees; and that the complaints made by Cybul which led to his discharge were made by him on behalf of himself and other employees.

[4] In *Interboro*, the court stated:

> The Board determined that John Landers' complaints constituted legitimate concerted activity, rejecting the examiner's finding that John was the sole protagonist and that his complaints were for his own personal benefit. Even if it were true that John was acting for his personal benefit, it is doubtful that a selfish motive negates the protection that the Act normally gives to Section 7 rights. [338 F.2d at 499.]

[5] The other cases cited by the dissent are also inapposite to the facts presented here. Thus, *Randolph Division, Ethan Allen, Inc.* v. *N.L.R.B.*, 513 F.2d 706 (1st Cir. 1976), enfg. 212 NLRB 148 (1974), concerned the case of a woman involved in the germinal phase of concerted action (she told the company's assistant superintendent that she wanted financial information about the company because she was worried that there was no union). The court held that her comments were a clear indication of her intent to engage in group action, and that since her activity could be construed as having been engaged in with an object of initiating, inducing, or preparing for group action, or that it had some relation to group action in the interest of the employees, such action was protected. *Banyard* v. *N.L.R.B.*, 505 F.2d 342 (D.C. Cir. 1974), has no application herein, as the court primarily considered the Board's deferral policy, and in the portion of the opinion paraphrased by the dissent the court was summarizing the contentions of one of the parties. We also note in passing that *Consolidated Freightways*, 253 NLRB 988 (1981), cited by the dissent at fn. 13, did not consider the issue of whether the discriminatee therein was discharged in violation of Sec. 8(a)(1) of the Act.

[6] See the Decision of the Administrative Law Judge, sec. I, par. 10:

> I find, as testified to by the Respondent's witnesses, that Richard Chandler drove the No. 10 more often than other employees did, but the truck was also driven on occasion by Manager Whittington, Clarence Chandler, Cloyd Runyon, James Wright, Cecil Justice, and Ralph Snidow, and none of them complained that it was unsafe.

other employees.[7] In the face of this factual matrix, the dissent's admonition that by dismissing this complaint we have failed to effect an accommodation with other statutes[8] is clearly without foundation. Rather, it is our dissenting colleague who has failed to consider *all* the facts of this case and, consequently, has reached a legal conclusion that is erroneous.

Finally, our dissenting colleague reproaches us for "seiz[ing] upon [Chandler's] inadvertent comment" and that our failure to find a violation herein "merely punishes the employee for not being prescient of a major change of Board policy . . . ." The short answer here is that, when deciding a case, the Board reviews *all* the evidence before it, and the relative weight assigned to particular bits of evidence does not rest upon either the intent or the inadvertence of a witness in testifying the way that he or she does.[9] In this instance, Chandler's testimony[10] that the substance of his sworn statement was true was freely given, and we construe such testimony as tantamount to an admission against his own interest, according it, therefore, great weight indeed.[11]

In sum, and contrary to the claim of our dissenting colleague, we have not effected a major change in Board policy. We have, however, taken note of the facts before us, and our decision to dismiss the complaint, which is wholly on those facts, is hardly the apocalypse envisioned by the dissent.

Accordingly, we find that Respondent herein did not violate Section 8(a)(1) of the Act when it discharged Richard Lee Chandler for refusing to drive the No. 10 truck, and we shall therefore, dismiss the complaint herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

MEMBER JENKINS, dissenting:

My colleagues' dismissal of this complaint reverses many years of Board precedent, protecting the rights of individual employees under the statute

[7] See the Decision of the Administrative Law Judge at fn. 5:

> Drivers Joe Smallwood and Ralph Snidow testified they agreed with Richard Chandler that the No. 10 was unsafe and Smallwood seemed to indicate he told one or both of the Whittingtons he thought so. However, I can place no reliance whatsoever on any of the testimony of either of these witnesses.

We note in passing that the dissent does not find fault with the credibility resolutions of the Administrative Law Judge.

Our dissenting colleague also concludes:

> Simply put, the other employees shared his concern, but knew full well what the results of complaining about the safety defects in the big truck would be; namely, company disapproval and ultimate discharge.

We disagree. Indeed, contrary to our colleague's assertion, there is simply no support for such a conclusion, the record being devoid of any evidence of animus on the part of Respondent, and, as noted above, containing *no* credited evidence that other employees had in any way discussed or expressed similar concerns. Thus, if there had been such record evidence, it is unlikely that we would be at odds with our dissenting colleague over the existence of a violation herein, since his above-cited conclusion presupposes that the drivers would have, at some point, openly discussed and expressed some sort of concern about the truck so as to have invoked the "company disapproval" of which the dissent speaks. This scenario, however, did not occur, and Chandler's statement that "the other drivers didn't mind driving the red truck like I did" thus stands uncontradicted, and is dispositive of the issues herein.

[8] Citing *Southern Steamship Company* v. *N.L.R.B.*, 316 U.S. 31, 47 (1942); and *Alleluia Cushion Co., Inc.*, 221 NLRB 999 (1975).

[9] It is true that an administrative law judge can base a finding of credibility on a perceived attempt by a witness to shade testimony in a manner most favorable to him. Chandler's testimony does not, however, present such a situation.

[10] See fn. 7 of the Decision of the Administrative Law Judge, and fn. 2 herein.

[11] Contrary to our colleague's characterization that we have "misapplied" Rule 804(b)(3) of the Federal Rules of Evidence, it is our position that Chandler's statement is *not* an exception to the rule against hearsay, where, for example, the declarant is somehow unavailable. Indeed, this proceeding presents no such circumstance. Thus, Chandler is a party to this proceeding, and he testified under oath, and was cross-examined, during which he reaffirmed the truth of the statement that "the other drivers didn't mind driving the red truck like I did," contained in his prior sworn affidavit. Our dissenting colleague then goes on to argue, as he does elsewhere in his dissent, that Chandler's statement is, nonetheless, entitled to "little weight," since "no lay individual would understand it to be contrary to his interest, or know of the approaching change in Board policy." The weight assigned to a particular bit of evidence, however, does not depend upon whether or not the declarant was aware of the legal implications of the statement at issue. Finally, the dissent cites Rule 602 of the Federal Rules of Evidence, apparently in support of the position that Chandler's testimony, cited above, was "speculative," and should not, therefore, be accorded "great weight." Rule 602, which states in relevant part that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter," also states, however, that "evidence to prove personal knowledge may, but need not, consist of the testimony of the witness itself." Thus, the record establishes the following factual predicates for Chandler's statement: (1) that Chandler was employed by Respondent as a driver; (2) that Chandler worked out of the same terminal with the other drivers; and (3) that, as specifically found by the Administrative Law Judge, "the truck was also driven on occasion by Manager Whittington, Clarence Chandler, Cloyd Runyon, James Wright, Cecil Justice, and Ralph Snidow, and none of them complained that it was unsafe." (ALJD, sec. I, par. 10.) The requirements of Rule 602 were therefore satisfied, and it thereupon fell to Chandler to repudiate his statement by denying knowledge of its substance, or to counsel for the General Counsel either to lodge an objection to Chandler's testimony or to rehabilitate his witness by determining that Chandler did not, in fact, possess such personal knowledge in support of his statement. Neither Chandler nor counsel for the General Counsel so attempted, however, and Chandler's testimony must, therefore, stand.

Member Zimmerman further notes that the dissent's reliance on Rule 602 completely distorts the issue before the Board. The issue to be determined, in Member Zimmerman's view, is whether Chandler acted, or reasonably believed himself to have acted, in concert with his fellow employees. Member Zimmerman concludes that Chandler's statements, both at the hearing and in his affidavit, evidence his state of mind. They demonstrate his belief that none of his fellow employees shared his concern about the safety of the truck. The evidence is thus clear and uncontradicted that Chandler did not act, or believe himself to have acted, in concert with his fellow employees.

we are charged to administer.[12] Accordingly, I dissent.

The Board through a long line of cases[13] has held that, if an individual has a reasonably held belief that a piece of job-related equipment is unsafe, that employee has the right to voice this concern and, if it is uncorrected, to refuse to operate the equipment and the Board will protect that right. In the interest of safety for all employees, it has not required proof of injury or action by a group of employees before protecting that right.[14]

Underlying these Board decisions has been the recognition that, as was stated by the United States Supreme Court in *Southern Steamship Company* v. *N.L.R.B.*, 316 U.S. 31, 47 (1942):

> [T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.

In deference to this admonition, the Board stated in *Alleluia Cushion, supra* at 1000:

> [M]inimum safe and healthful employment conditions for the protection and well-being of employees have been legislatively declared to be in the overall public interest . . . . Accordingly, where an employee speaks up and seeks to enforce occupational safety designed for the benefit of all employees, in the absence of any evidence that fellow employees disavow such representation, we will find an implied consent thereto and deem such activity to be concerted.

While I am aware that the Board's position in these cases has not been met with unanimous court approval, neither has the principle been unanimously rejected. In enforcing an employee's right to present complaints to his employer with respect to the right to "safety equipment" under a union agreement, the Second Circuit Court of Appeals held:[15] "The Board determined that [the employee's] complaints constituted legitimate concerted activity, rejecting the examiner's finding that [the employee] was the sole protagonist and that his complaints were for his own personal benefit. Even if it were true that [the employee] was acting for his personal benefit, it is doubtful that a selfish motive negates the protection that the Act normally gives to Section 7 rights."

Similarly, the First Circuit stated in *Randolph Division, Ethan Allen, Inc.* v. *N.L.R.B.*,[16] that, when an employee was ordered reinstated after she requested financial information about the company, such activity by a sole employee, even in the absence of a union agreement, could be considered "concerted activity" for unfair labor practice purposes, even though the statements were made solely to management, since the complaint was not a merely personal concern, but had the welfare of other workers in mind. "[C]onversation may constitute a concerted activity although it involves only a speaker and a listener . . . and that it [have] some relation to group action in the interest of the employees. The requirement of concertedness relates to the end, not the means." A similar result was reached in *Banyard* v. *N.L.R.B.*[17] where an individual employee's refusal to drive a truck admittedly overloaded in violation of Ohio state law was considered to be "a protest against abnormally dangerous working conditions . . . and a protest on behalf of other employees against the unsafe condition of the vehicle, and to secure its repair."

For my colleagues to turn away from the recognition that the individual acting alone in today's industrial society can hardly act effectively can only lead to injustice in the market place, and confusion as to present and future Board law.[18] To seize

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[12] My colleagues criticize this characterization of their opinion. I submit, however, that this is the *de facto* result of the majority decision. The Board in *Alleluia Cushion Co., Inc.*, 221 NLRB 999, 1000 (1975), dealt with safety complaints by an individual employee. The Board held that "the absence of any outward manifestation of support for his efforts is not . . . sufficient to establish that Respondent's employees did not share [the charging party's] interest in safety . . . . Safe working conditions are matters of great and continuing concern for all within the work force." The Board since *Alleluia Cushion* has continued to apply that standard to the progeny of that decision, and to extend the protection of Sec. 7 to matters of concern to all employees. The majority opinion overrules this principle.

[13] *Alleluia Cushion Co., Inc., supra; Self Cycle & Marine Distributor, Inc.*, 237 NLRB 75 (1978); *Ontario Knife Company*, 247 NLRB 1288 (1980); *Steere Dairy, Inc.*, 237 NLRB 1350 (1978); *Blaw-Knox Foundry & Mill Machinery Inc.*, 247 NLRB 333 (1980); *Consolidated Freightways*, 253 NLRB 988 (1981); *Bay-Wood Industries, Inc.*, 249 NLRB 403 (1980); *John Sexton & Co., a Division of Beatrice Food Co.*, 217 NLRB 80 (1975).

[14] See *Thermofil, Inc.*, 244 NLRB 1056 (1979).

[15] *N.L.R.B.* v. *Interboro Contractors, Inc.*, 388 F.2d 495, 499 (2d Cir. 1967).

[16] 513 F.2d 706, 708 (1st Cir. 1975), citing *Mushroom Transportation Co.* v. *N.L.R.B.*, 330 F.2d 683, 685 (3d Cir. 1964).

[17] 505 F.2d 342, 347–348 (D.C. Cir. 1974).

[18] As my colleagues well know, each case contains its own factual dimensions, and it is within those parameters that we seek to establish clear and consistent Board policy. As my dissent makes clear and as admitted by the majority opinion, *Interboro Contractors, supra*, stands for the proposition, *inter alia*, that because an employee may act, in part, out of selfish motives that employee is not removed from the protection of Sec. 7 of the Act. Further, it is clear that, while Chandler's complaints regarding the safety of the truck were based on fact, his complaints also involved a safety problem of concern to all employees, as was found by the

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upon an inadvertent comment made by employee Chandler concerned for his safety and deny him reinstatement merely punishes the employee for not being prescient of a major change of Board policy—an error also made, it would appear, by the Administrative Law Judge.[19]

The operative facts in this case are not in dispute and I believe that these facts establish the proper predicate for the finding of the violation. These facts establish the following:

(1) the employee had reason to believe that the truck he was required to drive was unsafe;

(2) these safety problems included faulty turn signals, headlights, wiring, and speedometer;

(3) the wiring problem was discussed with and confirmed by a company mechanic who said the truck needed a whole new wiring system, which was done apparently after the employee was discharged;

(4) the discharged employee had more reason to be concerned with the safety of this truck than other employees since he had to drive it more often;

(5) the employee advised management of these problems on at least two occasions without result;

(6) these safety problems were discussed with other employees;

(7) the employee on the day he was terminated almost had an accident while driving the truck due to the lack of a turn signal on the vehicle;

(8) the safety complaints involved other employees since upon occasion they also drove the truck.

I do not believe that Chandler's fellow employees did not share his concern in driving a vehicle with working turn signals, correctly adjusted and working headlights, an engine correctly wired, and a working speedometer.

Under controlling precedent and the facts of this case, this employee is entitled to backpay and reinstatement.

Accordingly, I dissent.

DECISION

STATEMENT OF THE CASE

ALMIRA ABBOT STEVENSON, Administrative Law Judge: A hearing was conducted in this proceeding at Charleston, West Virginia, on February 11 and 12, 1980. The charge was served on the Respondent on June 18, 1979. The complaint was issued on August 2, 1979, and duly answered by the Respondent. The complaint and the answer were amended at the hearing.

The issue is whether the Respondent violated Section 8(a)(1) of the National Labor Relations Act, as amended, by discharging Richard Chandler on May 7, 1979, for the reason that Chandler refused to drive one of the Respondent's trucks because he reasonably believed it was unsafe. As fully explained below, I conclude that the Respondent violated the Act as alleged.[1]

Upon the entire record, including my observation of the demeanor of the witnesses, and after due considera-

Administrative Law Judge. Cf. *Washington Cartage, Inc.*, 258 NLRB 701 (1981), where the Board adopted the findings of the Administrative Law Judge that the vehicle in question produced employee "gripes" about driving the machine, rather than concerns over its safety; and that the discharged employee's fear resulted from his inexperience, rather than from any "unsafe" condition of the vehicle.

[19] The majority opinion is predicated largely on two sentences made by Chandler in his pretrial affidavit, "I was looking out for myself, not the other drivers. The other drivers didn't mind driving the red truck *like I did.*" (Emphasis supplied.) While the first sentence of this comment was contested by Chandler at the hearing, the majority opinion admits these words are not determinative. Rather, they find of decisional importance his words that the other drivers did not mind driving the big truck "*like I did.*" My colleagues accuse me of not considering all pertinent record evidence. I submit that it is they who have confused the admissibility of a statement against interest with the weight which should be accorded such a 12-word sentence. In ascribing "great weight" to this statement because it is allegedly a "statement against interest," my colleagues have misapplied a rule of evidence applicable when the declarant is not available, a rule which relates to the admissibility of the statement, not to the weight to be accorded it. (See Federal Rules of Evidence, Rule 804(b)(3).) While Chandler reaffirmed most, but not all, of the statement at the hearing herein, I am of the opinion, contrary to my colleagues, that the statement is entitled to little weight, since no lay individual would understand it to be contrary to his interest, or know of the approaching change in Board policy. Of greater weight for the Administrative Law Judge, and for me, are her findings that "Chandler had a reasonable belief during the entire time of his employment that the No. 10 truck was unsafe"; and that "Chandler's complaints involved a safety problem of concern to all of them." Thus, "great weight" was properly put by the Administrative Law Judge in finding an 8(a)(1) violation of the Act upon that record evidence dispositive in the light of previous Board law, and not upon a speculative statement by Chandler. (See Federal Rules of Evidence, Rule 602.) My colleagues admit that under the Federal Rules of Evidence a witness may not testify to a matter unless evidence is introduced showing personal knowledge, and that evidence to prove personal knowledge need not consist of the testimony of the witness. I presume they would also agree that "little weight" would be accorded a statement where evidence of personal knowledge is lacking. In their recitation of the factual predicates for Chandler's statement, they have proven Chandler's employment at the terminal, and the fact that other employees occasionally drove the truck in question. This, I submit, does not constitute evidence sufficient to establish *knowledge* on Chandler's part of the statement made. The missing link in the majority's recitation, I submit, is conversation; conversation between Chandler and other employees, or between other employees which Chandler overheard. The burden of showing such knowledge, moreover, does not rest with the witness, but rather with the party who seeks to use the testimony; here, the Respondent. A simple question put to Chandler might have established the existence of any such conversations. However, the majority decision cites no such evidence. In any event, this statement is at best ambiguous, vague, and falls far short of proving that Chandler's fellow employees had *no* concern for the lack of safety; i.e., the employees cared some, cared none, cared a little. Moreover, the Administrative Law Judge found that "Chandler's complaints involved a safety problem of concern to all of them and none of them disavowed Richard Chandler's complaints." Thus, while Chandler was the only employee willing to put his job "on the line," this was understandable since, as found by the Administrative Law Judge, Chandler drove the truck more often than the others, and had narrowly escaped having an accident due to the lack of any turn signals on the vehicle. Simply put, the other employees shared his concern, but knew full well what the results of complaining about the safety defects in the big truck would be; namely, company disapproval and ultimate discharge.

[1] No issue is presented as to jurisdiction. Based on the jurisdictional facts alleged in the complaint and admitted in the amended answer, I conclude that the Respondent is an employer engaged in coimerce within the meaning of Sec. 2(2), (6), and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction in this proceeding.

tion of the briefs filed by the Respondent and the General Counsel, I make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. UNFAIR LABOR PRACTICES

The Respondent is a family-owned interstate trucking carrier, with headquarters in Glen Burnie, Maryland, and a terminal in Charleston, West Virginia, involved in this proceeding. The president and controlling stockholder is Ralph Smith; operations manager over all operations is George Shanabrook. Both officials are stationed at company headquarters. Albert (Jock) Whittington is district manager, with authority over the Charleston terminal. The record shows, and I find, that these individuals are supervisors and agents of the Respondent.

Albert Whittington's wife Pauline works in the Charleston terminal office as a volunteer without pay two to four afternoons a week answering the telephone, doing clerical work, and, when Albert Whittington is not present, which seems to be seldom, instructing drivers on a rotation basis to make pickups.[2]

Richard Chandler was employed by the Respondent as a truckdriver for a period of 2 months beginning March 5, 1979. He was hired chiefly because of Manager Whittington's high regard for his father, Clarence Chandler, who had worked for the Respondent for many years. The day before Richard was hired Clarence Chandler called and, with Whittington's permission, offered him the opportunity to make two trips to Huntington, West Virginia, a distance of about 50 miles. Richard Chandler agreed, and was assigned to drive the Respondent's No. 10 truck, also referred to as the big red truck. This is a 1969 model International tractor-trailer with a diesel engine and no power steering, designed for heavy-duty work. Richard Chandler testified there were fumes in the cab which seemed to come from the engine; when he returned he told Manager Whittington about the fumes; and Whittington instructed him to park the truck and said he would not have to take the second trip and that Whittington would have the problem taken care of.

Richard Chandler also testified that the windshield wipers would not work, but he stopped the truck and started the wipers manually from outside and had no more trouble with them. He also testified on this first experience with No. 10 he noticed it was noisy and hard to steer; the speedometer, turn signals, and heater did not work; and the headlights were out of alignment. There is no indication, however, that he reported these matters or claimed that the truck was unsafe at this time.

Richard Chandler testified he was instructed to drive the No. 10 truck to Huntington a second time, about 2 or 3 weeks after he was hired, and on this trip he discovered that nothing had been fixed; there were no turn signals, none of the instrument gauges were working, "fumes in the cab would put you to sleep," the cab "was shaking all over the place," the fifth wheel "had slack in it and was jumping up and moving around," there was no door handle on the inside, and the heater did not work.[3] Upon his return, Chandler said, he told Whittington "the things that was wrong with" the truck and that Chandler felt "the truck is unsafe"; and Whittington said "we're going to have to get it fixed."

Chandler also testified that around April 10 he was instructed to help Cecil Justice, a new mechanic, fix the lights; Justice opened the hood and they observed that "[t]he wires were cut up all underneath the dashboard and underneath the hood" and "[w]ires were sticking out everywhere, cut and everything"; so Justice told Whittington "that truck is going to need a whole new wiring system or harness to get the lights working"; but nothing was done about this problem.

Richard Chandler drove the No. 10 a few times after that but, he said, "It never had been fixed."

The record indicates that a broken muffler was discovered and repaired within a few days of Richard Chandler's first trip to Huntington, eliminating the fumes in the cab. I also find that, although the tractor was noisy, this was not a safety problem. Nor did the heater pose a safety problem, particularly during the time of year Richard Chandler was employed by the Respondent. Moreover, Richard Chandler's difficulties with the steering seemed to have stemmed solely from the absence of power steering, about which all the drivers complained, but this was not a safety factor either.[4]

However, I do credit Richard Chandler that upon his return from his second trip to Huntington, 2 or 3 weeks after he was hired, he protested to Manager Whittington personally that the No. 10 truck was unsafe to drive and specified among his reasons that there were no turn signals and none of the instrument gauges were working.

I find, as testified to by the Respondent's witnesses, that Richard Chandler drove the No. 10 more often than other employees did, but the truck was also driven on occasion by Manager Whittington, Clarence Chandler, Cloyd Runyon, James Wright, Cecil Justice, and Ralph Snidow, and none of them complained that it was unsafe.[5]

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[2] It is unnecessary to resolve a dispute over whether Pauline Whittington is a supervisor or agent of the Respondent.

[3] Chandler testified that Whittington had told him "go around the weigh station on the way" to Huntington, but there is no evidence as to the reason for this instruction.

[4] I have not considered evidence regarding the repair of a spring shackle on the No. 10 truck which Richard Chandler also reported, as he did not seem to consider this a safety factor and there is persuasive evidence that it was repaired. Moreover, no reliance is placed on Richard Chandler's testimony that upon his return from a trip to Kaiser Ridge, Maryland, on or about April 18, 1979, during a week when Albert and Pauline Whittington were on vacation and Richard Chandler's father, Clarence Chandler, was in charge of the terminal, Richard Chandler presented a written list of all "the same things [that] were still wrong with the truck as before," told Clarence Chandler he was "scared of this truck," and asked that the list be given to Whittington on his return. In all the circumstances of this case, including the evidence that Clarence Chandler became aware, upon Whittington's return from vacation, that Richard Chandler's job was in jeopardy because of President Smith's objections to his continued employment, as referred to below, it is most unlikely that Richard Chandler's father passed along the list or the safety protest. There is no contention that Clarence Chandler was an agent or supervisor of the Respondent or had authority to remedy the safety factors complained of.

[5] Drivers Joe Smallwood and Ralph Snidow testified they agreed with Richard Chandler that the No. 10 was unsafe and Smallwood seemed to indicate he told one or both of the Whittingtons he thought so. However, I can place no reliance whatsoever on any of the testimony of either of

Continued

President Smith and Manager Whittington testified that all the Respondent's vehicles are regularly checked by the Department of Transportation and no safety citations have been received, but they did not specify that any such inspections were made during the 2-month period that Richard Chandler was employed. Whittington and mechanic Runyon also testified that pre-interstate trip inspections are required by law, and that deficiencies revealed by such inspections, by routine inspections on the part of Runyon, and those reported by drivers are corrected as a matter of course. Runyon added that he never allowed equipment to leave the terminal without lights and turn signals if he knew about it, and that he considered the No. 10 truck a safe, dependable vehicle. However, Runyon was not working for at least a month from early April until just before Richard Chandler's departure, and Chandler's testimony that the turn signals were not operative on his last day is undisputed. Moreover, Whittington's testimony indicates pretty clearly that items such as turn signal lights and headlights need frequent replacement, and that the odometer and fuel gauge on the No. 10 were not operative. He and Runyon also testified that the speedometer was repaired in 1979, and that other repairs to the truck that year included wiring for the headlights and other wiring, and replacing turn signal bulbs. Although Whittington placed the speedometer repair in early 1979, Runyon did not. In these circumstances, and in view of Runyon's prolonged absence during that spring, all these repairs could have been made after Chandler left the Respondent's employ. George Shanabrook, operations manager, testified that the No. 10 was transferred from Charleston to the Glen Burnie terminal and on June 7, 1979, a month after Richard Chandler's departure, it was "[r]ewired under [the] dash" and the fuses, which had shorted out, were replaced. The Respondent's witnesses insisted that all of these matters were merely routine, minor, and did not affect the safety of the truck. But they were clearly matters which did affect safety and I credit Richard Chandler that the wiring was in worse condition than management acknowledges; moreover, the record suggests that inspection and maintenance procedures were not rigidly adhered to at the Charleston terminal. It therefore seems likely, as Richard Chandler testified, that the turn signal, headlight, wiring, and speedometer systems, at least, were subject to malfunction during his entire period of employment.

Richard Chandler described the events of May 7, 1979, his last day with the Respondent, as follows: Manager Whittington dispatched Chandler to make a pickup at an address in Charleston in the No. 10 truck; Chandler made the pickup and returned to the terminal aggravated because the No. 10 was so hard to steer. Whittington then instructed Chandler to make another pickup in the No. 10 at an address only two or three blocks from the terminal. Chandler asked Whittington "if I would take that truck." And Whittington told him yes, "it's all that is out there." Returning from this pickup, Chandler almost had an accident turning right into the terminal because the truck was so hard to steer and it had no operating turn signals. He then pulled into the terminal and parked without backing the trailer into the dock. After he parked, he went in and told Pauline Whittington,

> . . . this truck is unsafe, I would rather not drive it anymore, I'm scared it's going to get somebody hurt.

Pauline Whittington promised to tell her husband when he returned to the office.

Richard Chandler went out on the dock and began unloading another truck when Whittington returned, went into the office, came out, and said, "Richard, we don't need you anymore." Chandler asked whether he should finish unloading the other truck, but Whittington told him, "no, we can't use you anymore." The next day, Richard Chandler telephoned Whittington and asked whether he should come to work, but Whittington said, "We can't use you . . . you refused to drive that truck."

Although Richard Chandler was guilty of some apparent inconsistencies in his further testimony about the events of this day, and he omitted Manager Whittington's order, before entering the office on his return, that Chandler turn the No. 10 truck around and back it into the dock, and although Cloyd Runyon testified that Chandler informed him, later in the day, that Chandler had quit his job, I believe, on the whole, that Richard Chandler was the most accurate of the witnesses as to what was said. Thus, Pauline Whittington insisted that Richard Chandler told her he was quitting, without mentioning the unsafe condition of the truck, and Manager Whittington testified similarly on direct examination that this was the message she gave him, and, further, that he then went out to the dock and Richard Chandler also informed him that he had quit. However, on cross-examination, Manager Whittington acknowledged stating in his pretrial affidavit that Pauline Whittington told him, "Richard had quit, said he did not want to drive anymore—*that the truck was not safe* . . . ." He also testified that when he went out on the dock he observed that Richard Chandler had not turned the No. 10 truck around as he had instructed,

> I did tell him that if he couldn't back the truck in he could just as well go home, there wasn't nothing else to do. Of course, in the meantime he was on the clock too, on company time and refusing to do his work which I didn't think was fair to the company or to me.

Whittington continued that he went out and turned the truck and backed it into the dock himself while Richard Chandler sat on the steps, and then Richard Chandler

> . . . did come back to the office after that. He asked me if he should go to work and I said, no, Richard. I don't need you now, then he went on home.

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these witnesses. Smallwood's testimony about his alleged safety complaint, like most of his other testimony, was vague and inconsistent and he admitted he habitually falsified his trip logs in violation of Federal law. Snidow was so inconsistent as to be practically incomprehensible and he admittedly made false statements in his logs and in an affidavit given to the National Labor Relations Board.

This testimony is consistent with that of Richard Chandler that he did not quit but only refused to drive the No. 10 truck, that he gave as his reason that he considered the truck to be unsafe, and that Whittington terminated him because of it. I so find.

The Respondent put into the record a considerable amount of evidence in support of its alternate contention that, even if Richard Chandler did not quit, it had several lawful reasons for terminating him. Thus, President Smith and Manager Whittington testified that Smith urged Whittington on several occasions to discharge Chandler because he failed to file a completed application form and other forms as requested to establish his qualifications as a truckdriver, and because Smith suspected that Chandler had falsified his timecards and was drunk on the job while Manager Whittington and his wife were on vacation in April and Chandler's father was in charge of the terminal. The record is quite clear, however, that the Respondent did not discharge Richard Chandler for any of these reasons, as President Smith and Manager Whittington admitted. It is also clear that Whittington did not discharge Richard Chandler because he received a complaint about him from the first customer from which Chandler made a pickup on May 7; Whittington acknowledged on cross-examination that he did not receive the complaint until 3 days later. This alternate contention is therefore without merit.[6]

I have found that Richard Chandler had a reasonable belief, during the entire time of his employment, that the No. 10 truck was unsafe; that he so advised the manager 2 or 3 weeks after his hire; that he nearly had an accident on May 7 because, in part, the turn signals on the truck were not operative; that he immediately requested Pauline Whittington to inform Albert Whittington that he would not drive the truck anymore because it was unsafe; that the message was conveyed; and that Albert Whittington then terminated Richard Chandler for his refusal to drive the truck because he reasonably believed it to be unsafe. Inasmuch as this truck to the Respondent's knowledge was driven on occasion by other employees of the Respondent, Chandler's complaints involved a safety problem of concern to all of them, and none of them disavowed Richard Chandler's complaints, I conclude that, even though Richard Chandler was not concerned about the safety of the other drivers,[7] his refusal to drive the truck was, in legal contemplation, concerted activity protected by Section 7 of the Act, and his discharge therefor was a violation of Section 8(a)(1).[8]

II. REMEDY

In order to effectuate the policies of the Act, I shall recommend that the Respondent be ordered to cease and desist from the unfair labor practices found, and from infringing in any like or related manner on its employees' rights guaranteed by the Act.

Having found that the Respondent interfered with, coerced, and restrained its employees by discharging Richard Lee Chandler on May 7, 1979, in order to effectuate the policies of the Act, I shall recommend that the Respondent be ordered to take certain affirmative action, including that it offer him immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent job, without prejudice to his seniority or other rights and privileges, and to make him whole for any loss of earnings suffered by reason of the Respondent's unlawful conduct against him. Backpay shall be computed as provided in *F. W. Woolworth Company*, 90 NLRB 289 (1950). Interest shall be paid on all backpay due. *Florida Steel Corporation*, 231 NLRB 651 (1977); *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[Recommended Order omitted from publication.]

[6] There is also no merit in the Respondent's further contention that it could discharge Richard Chandler for any reason because he was only a probationary or casual employee. The protection of the Act extends to all employees. See *Georgia-Pacific Corporation*, 204 NLRB 47 (1973); *Bird Trucking & Cartage Co., Inc.*, 167 NLRB 626 (1967).

[7] Richard Chandler stated in his pretrial affidavit that "I was looking out for myself, not the other drivers. The other drivers didn't mind driving the red truck like I did."

[8] *Datapoint Corporation*, 246 NLRB 234 (1979); *Thermofil, Inc.*, 244 NLRB 1056 (1979); *Pink Moody, Inc.*, 237 NLRB 39 (1972); *Air Surrey Corporation*, 229 NLRB 1064 (1977); *Carbet Corporation*, 191 NLRB 892 (1972).